



REPUBLIC OF KENYA



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**Wanjigi & another v Bank of Africa Kenya Ltd & 2 others (Civil Case 237 of 2014)
[2015] KEHC 6971 (KLR) (Commercial & Admiralty) (13 March 2015) (Ruling)**

Maina Wanjigi & another v Bank of Africa Kenya Ltd & 2 others [2015] eKLR

Neutral citation: [2015] KEHC 6971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE 237 OF 2014**

EKO OGOLA, J

MARCH 13, 2015

BETWEEN

MAINA WANJIGI 1ST APPLICANT

JANE NDATA CHEGE 2ND APPLICANT

AND

BANK OF AFRICA KENYA LTD 1ST RESPONDENT

GARAM INVESTMENT AUCTIONEERS 2ND RESPONDENT

MICHAEL MATU 3RD RESPONDENT

Illegality of conducting an auction in the same transaction in stages.

Reported by Andrew Halonyere

***Public Auction** - auction of immovable property - whether an auction in the same transaction could be conducted in stages during the cause of the day - whether such an auction would compromise the integrity of the process - Auctioneers Act, rule 17 (1) (b)*

***Civil Practice and Procedure** - stay - application for stay - application to stay the intended sale of suit property emanating from unlawful and unprocedural public auction - where the public auction in the same transaction was conducted in stages during the cause of the day - whether the application had merit - Civil Procedure Act (cap 21) sections 1A, 3B, 3A, and 80; Civil Procedure Rules (cap 21 Sub Leg) order 14, order 22 rule 22*

Brief facts

The applicant brought an application seeking orders of stay of an intended sale purported to emanate from an auction by the respondents.



According to the applicants, the suit property was advertised for sale by public auction in the Daily Nation on May 26, 2014 by the 2nd respondent. The auction was slated to take place on June 3, 2014 at 11.00am at the 2nd respondent's offices.

The Applicants alleged that the 2nd respondent conducted two sessions of the auction, one at 12:30 pm and another at 3:30 p.m. contrary to the Auctioneers Rules. It was submitted that there was no legal and valid advertisement made in respect to the 2nd auction over the same property arguing that it was in clear contravention of the Auctioneers Rules, and that the property was given out to the 3rd highest bidder contrary to the Auctioneers Rules and in blatant abuse of the law.

Issues

Whether an auction in the same transaction could be lawfully conducted in stages during the course of the same day? If yes, would it compromise the integrity of the process?

Relevant provisions of the Law

Auctioneers Act

Rule 17

a. a public auction shall take place between the hours of 10.00 a.m. and 10.00 p.m; and in a venue open to and accessible to the public; and

b. sub-rule 4; The highest bidder shall be the purchaser subject to compliance with the conditions of sale.

Held

1. Under Rule 17(1)(b) an auction of immovable property may take place between 10.00 a.m. and 10.00 p.m. That meant that an auction of immovable property advertised to take place at 11.00 a.m. may proceed upto 10.00 p.m. That view, however, necessarily implied that the auction process had to be uninterrupted transaction. The moment the chain of causation was interrupted, rather than in the normal course of the proceedings for example to break for tea, if that were possible in a single transaction, the entire process must commence afresh.

2. There was a reason why the auction was called Public Auction and not private auction. A public auction was a process open to the public. The public only came to learn about it when it was advertised. The moment the advertised day and time came, and the auction was not responsive and it was stopped for that reason, a valid similar process could only start with a fresh advertisement. In the instant case, the public was not aware of the afternoon session, whatever transpired in the afternoon was a private arrangement shared into by the parties before the Court, and for all intents and purposes, was not a public auction. Therefore no public auction took place on June 3, 2014 involving the suit property.

3. To hold that the plaintiff ratified and validated the process by attending the afternoon session would amount to giving the auctioneer freedom to change the auction rules with impunity whenever he wills, and especially whenever he thinks that he could wait for a none present bidder to give a higher bid. In that case there would be no need to stage a public auction. The auctioneer might as well develop and carry out his own rules as he pleased.

4. An auction could not be held in stages during the course of a day, where in one or more stages, the auctioneer awaited for hitherto unknown bidders, or picked bidders enroute like a moving bus or *matatu* picked passengers. If that was allowed to happen the entire integrity of the public auction process would be compromised, and with it the rule of law. That would open doors to speculation with the possibility of the auctioneer colluding with hitherto unknown bidders to defeat the bids put on the floor of the auction house. Such a process, if allowed, would be unlawful.

5. Whatever transpired on June 3, 2014 purported to be a public auction, was not a public auction, it was an unlawful process which was incapable of conferring any title or proprietary rights to the alleged successful bidder, the 3rd defendant. Therefore the 3rd defendant had not acquired title which required to be protected by law. A title could only be acquired through a lawful process.



6. The 1st defendant's right to realise security could not be fettered or frustrated any longer. The current proceedings were brought about by the unlawful conduct of the auctioneer, the 2nd defendant. If the auctioneer did the right thing, the 1st defendant would have realised its security.

Application allowed.

Orders

(a) Public Auction staged for the sale of the suit property on June 3, 2014 and all the consequences arising therefrom set aside.

(b) The 1st and 2nd defendant's were at liberty to advertise afresh the sale by Public Auction of the suit property, immediately, without giving a fresh statutory notice.

(c) The 3rd defendant to be refunded all the monies paid by him to the 1st or 2nd defendant pursuant to the aforesaid alleged public auction stated on 3rd June 2014.

(d) The costs of the application were for the Plaintiffs and the 1st defendant and shall be paid by the 2nd defendant.

Citations

East Africa

1. *Kanyagia, Patrick v Damaris Wangechi & 2 others* Civil Appeal No 150 of 1993 - (Explained)
2. *Kotedia, Kiran Ramji v Trust Bank Ltd* Civil Case No 1319 of 1999 - (Explained)
3. *Lucia Mwehuya t/a Kalebran Enterprises v Nairobi Bottlers Limited & 3 others* Civil Case No 10 of 2012 - (Explained)
4. *Macharia, Jane Wambui v Giro Commercial Bank Limited & 2 others* Civil Suit No 181 of 2004 - (Explained)
5. *Nairobi Permanent Markets Society & 11 others v Salima Enterprises & 2 others* Civil Appeal No 185 of 1997 - (Mentioned)
6. *National Bank of Kenya Ltd v Ayah* [2009] KLR 762 - (Explained)
7. *Nationwide Finance Co Ltd v Meck Industries Ltd* Civil Suit No 3231 of 1985 - (Explained)
8. *Ng'ok, Joseph NK Arap v Moiyo Ole Keiuwa & 4 others* Civil Application No NAI 60 of 1997 - (Mentioned)
9. *Republic v CW Nyamisa ex parte Peter Muriithi Kimubu* Civil Case No 817 of 2002 - (Explained)
10. *Wreck Motors Enterprises v Commissioner of Lands and 3 others* Civil Appeal No 71 of 1997 - (Mentioned)

Statutes

East Africa

1. Advocates Act (cap 16) sections 9, 34(1) - (Interpreted)
2. Auctioneers Act (cap 526) In general - (Cited)
3. Auctioneers Rules, 1997 (cap 526 Sub Leg) rules 16(1)(a)(b); 17(1) (b); 21; 26 - (Interpreted)
4. Civil Procedure Act (cap 21) sections 1A, 3B, 3A, 80 - (Interpreted)
5. Procedure Rules (cap 21 Sub Leg) order 14; order 22 rule 22 - (Interpreted)
6. Constitution of Kenya, 2010 article 159(2)(d) - (Interpreted)
7. Land Act, 2012 (Act No 6 of 2012) section 99 - (Interpreted)
8. Land Registration Act, 2012 (Act No 3 of 2012) section 26(1) - (Interpreted)
9. Registration of Titles Act (cap 281) (Repealed) sections 23, 24 - (Interpreted)

RULING

1. The Application before this Court is a Notice of Motion dated 4th June 2014. The application is filed under Order 14, Order 22 Rule (22) of the [Civil Procedure Rules](#) and Sections 1A, 3B and 3A and Section 80 of the [Civil Procedure Act](#) and all other enabling provisions of law.



2. The Plaintiff seeks to secure the following orders:-
 1. That the application be certified as urgent and service thereof be dispensed with and the same be heard *ex-parte* in the first instance.
 2. That this Honourable Court do grant a stay of the intended sale purported to emanate from the unlawful and or un procedural Auction conducted on the 3rd June, 2014, payment of purchase price, transfer and/or any other dealings on LR No 3734/1101, IR 55035, Lavington by the Respondents, their agents and or servants pending the hearing and determination of this Application Inter-Parties.
 3. That this Honourable Court do grant a stay of the intended sale purported to emanate from the unlawful and or un procedural Auction conducted on the 3rd June, 2014, payment of purchase price, transfer and/or any other dealings on LR No 3734/1101, IR 55035, Lavington by the Respondents, their agents and or servants pending the hearing and determination of the suit herein.
 4. That the Second Respondent be compelled to produce the proceedings of the Auction conducted on the 3rd June, 2014.
 5. That the costs of this Application be provided for.

Evidence

3. The application is supported by affidavit of Maina Wanjigi dated 4th June 2014 with its annexures and a further affidavit filed in court on 10th December 2014. The application is also premised on the several grounds set out therein. The Applicants state that the suit property was advertised for sale by public auction in the Daily Nation on the 26th May, 2014 by Garam Investment Auctioneers. The Auction was slated to take place on the 3rd June, 2014 at 11.00am at their offices at Muhu House, Kenyatta Market. The said Auction was attended by the Plaintiffs/ Applicants representative, and the First Defendants Representative one Felix Muhati among others. The Applicant states that the Auction was conducted in an un procedural and illegal way by the 2nd Respondent and the property given to the Third highest bidder, and that unless the orders sought are issued there is imminent danger of the property being sold at a price that is lower than what was offered at the bidding thus leading to a loss to the First Respondent and to the detriment of the owner of the property. The Applicants who met all the conditions and went through the bidding process shall suffer irreparable and irredeemable loss if orders sought are not issued as he will not be compensated for the costs incurred. The Applicants allege that the 2nd Respondent conducted two sessions of the Auction one at 12:30 pm and another at 3:30 p.m. contrary to the Auctioneers Rules. There was no legal and valid advertisement made in respect to the 2nd Auction over the same property in clear contravention of the Auctioneers Rules, and that the property was given out to the 3rd highest bidder contrary to the Auctioneers Rules and in blatant abuse of the law.
4. The application is opposed by all the three Defendants/Respondents. The 1st Defendant has filed a replying affidavit sworn by Ben Mwaura dated 20th June 2014 with annexures through which the 1st Defendant disputes the application. The 2nd Defendant also disputes the application through the Replying Affidavit sworn by Joseph Gikonyo dated 20th June 2014 and its annexures. The 3rd Defendant has disputed the application vide his replying affidavit dated 16th October 2014 with annexures.



5. The summary of all the Defendant's/Respondent's replying affidavits deny the Plaintiff's/Applicant's allegations in toto. The 1st Defendant gives the history of the matter and how the Plaintiff secured the loan facilities which were granted to him by the 1st Defendant using the suit property as security. Having failed to repay the loans, the 1st Defendant has made two previous attempts to sell the security but the Plaintiff has always resorted to court to stop the same. In the last court actions before the current proceedings the court had allowed the 1st Defendant to sell the security after issuing a fresh stationery notice, which was done, and it is that sale arising from the said statutory notice that is being challenged through this application. All the Respondents stated that the said auction was stage property and that the auctioneer followed the auction rules to the letter.
6. The 2nd Defendant, being the auctioneer, stated in his replying affidavit that the auction sale of all that property known as LR No 3734/1101 (I.R 55035) located in Lavington estate Nairobi ("the Subject Property") began shortly after 11.00 a.m. at which point he had two (2) bidders namely Jesse Wanyeki Mwangi representing Maina Wanjigi and Jane Nduta Chege. Also present at the auction was Mr. Felix Muhati representing the 1st Defendant, the chargee. Upon arrival at the auction mart, the said parties all recorded their names and signed the auctioneer's register (an extract of which is annexed and marked as "JG 1")
7. The auctioneer stated in his affidavit that the two bidders competed against each other with Jane Chege making an offer of Kshs 30 Million while Jesse Mwangi gave a final offer of Kshs 36.1 Million. Mr. Gikonyo then requested both parties to submit the Kshs 1 Million bankers cheques in compliance with the conditions of sale. At that point, Mr. Wanyeki submitted corporate cheques indicating that he had earlier been informed by Anne Wanjiru Magondu, the purported proprietor of the 2nd Defendant, that personal cheques were acceptable. The Auctioneer rejected this position. The said Ann Wanjiru also contested that position in her affidavit marked as "JG 2" to the affidavit of Mr. Gikonyo. According to Mr. Gikonyo, the Auctioneer, he informed Mr. Wanyeki that his offer was shy of the recommended forced sale value but Mr. Wanyeki refused to enhance the same claiming that he had to consult his principal (Mr. Maina Wanjigi) before doing so. In order to give time for further consultations, the Auctioneer then informed the two bidders that the hammer had not fallen, and that the auction was still open and in the event anyone came later in the day and offered a bid equivalent to or higher than the forced sale value, then the property would be sold. The two bidders requested that should that happen, they should be notified. They then left at about 1.10 p.m.
8. Mr. Gikonyo stated that at around 1.15 p.m, a third bidder by the name Michael Matu arrived and he tried to reach both Jane Chege and Wanyeki Mwangi in vain, and so he sent them an SMS message informing them of the 3rd bidder, and both Jane Chege and Wanyeki Mwangi returned the auction mart within five (5) minutes of the sending of the aforementioned message. The Auctioneer then informed Mr. Michael Matu, in the presence of the bank representative, that the hammer had not fallen on the Subject Property and that the highest bid received thus far was Kshs 36.1 Million. Upon that information, Mr. Matu gave an offer of Kshs 37 Million which was within the recommended forced sale value. At this point, both Mr. Wanyeki Mwangi and Jane Chege made bids of Kshs 37.5 Million and Kshs 38 Million respectively. However, despite making the aforesaid bids, both Mr. Wanyeki Mwangi and Jane Chege were unable to produce any deposit in terms of the requirements of the auction. The Auctioneer then lowered the hammer on Michael Matu at Kshs 37 Million since he had the requisite banker's cheques amounting to Kshs 1 Million. Mr. Matu also thereafter confirmed that he had made a Real Time Gross Settlement (RTGS) order for the sum of Kshs 8,250,000.00 due to the lateness of the hour. Mr. Matu then executed the Memorandum of Sale which was annexed and marked "JG 4".
9. Mr. Gikonyo stated that in view of the foregoing, it is clear that the auction on 3rd June, 2014 was conducted in compliance with the provisions of the Auctioneers Act, Chapter 526 and the Auctioneers



Rules 1997, and that contrary to the Plaintiffs' allegations, only one (1) auction was conducted on the 3rd June, 2014.

10. On his part, the 3rd Defendant deponed in his replying affidavit that he learnt of the public auction of the suit property through advertisements in the Nation Newspapers edition of 19th May 2014 and 26th May 2014. The advertisements stated that the auction would commence at 11.00 a.m. on 3rd June 2014, and the conditions of sale were expressly stated *inter alia* as follows;
 - a. A deposit of 25% of the purchase price was to be paid at the fall of the hammer;
 - b. A bidding deposit of Kshs 1,000,000 by way of bankers' cheque was to be paid.
11. The auction date he proceeded to the offices of the auctioneers at 1.15 p.m. and carried with him bankers cheque in respect of the bidding deposit. On arrival he was advised by Mr. Gikonyo, the Auctioneer, and the 1st Defendant's representative:- that the auction commenced at 11.00a.m. and had not been closed; that the property was still under auction as two earlier bidders had not met the reserve price set by the 1st Defendant; that he was free to make his bid offer for consideration. The 3rd Defendant then informed the Auctioneer that he was ready to bid whereupon he attempted to call the earlier bidders but his calls were not answered and he then advised him that he would send text messages to the said bidders. This was done, and in less than 10 minutes a gentleman and a lady who he later came to know as Wanyeki Mwangi and Jane Chege respectively came together to the auction and he was informed by the auctioneers that the two were the earlier unsuccessful bidders. The Auctioneer then informed him in the presence of the bank representative and the two bidders that the last offer made was for Kshs 36.1 million. He then made an offer for Kshs 37 million while Mr. Wanyeki and Jane Chege made bids of Kshs 37.5 million and Kshs 38 million respectively. The auctioneer then requested the two higher bidders (starting with the highest bidder) to confirm whether they were ready to pay the 25 % to enable the auctioneer to close the sale. None of the two bidders was able to raise the bidding deposit and 25% deposit but the 3rd Defendant was able to comply with the Conditions and he was declared the highest and most serious bidder and he duly paid the bidding deposit of Kshs 1,000,000/= by bankers cheque and thereafter issued instructions for RTGS for the 25% deposit of Kshs 8,250,000/= . (He annexed and marked "MM1" copies of the bankers' cheque and RTGS transfer advice). He then executed a Memorandum of Sale. (Annexed and marked "MM2" is a copy of the same).
12. The 3rd Defendant deponed that the auction sale was conducted above board and within the business hours specified in the Auctioneers Act and Rules. He was advised by his advocate that:-
 - a. He became the bonafide purchaser for value upon executing the Memorandum of Sale.
 - b. The Plaintiffs failed to comply with the conditions of sale and were no doubt speculative bidders.
 - c. The auction had not closed by the time he arrived at the auction mart. Indeed the Plaintiffs participated at the auction when they were summoned upon his arrival.
 - d. The orders sought cannot be granted as the equity of redemption was extinguished upon the execution of a contract of sale and the Suit Property is no longer available for Sale.
 - e. The registered owner of the suit property has not lodged any complaint as regards the manner of sale of the suit property and in the circumstances, the Plaintiffs not being the registered owners thereof, have no locus standi seek the orders sought.
 - f. That as a bonafide purchaser for value he is protected by the provisions of Section 99 (2) of the Land Act No 6 of 2012.



- g. The Plaintiffs remedy if any, lies in damages as stipulated under Section 99(4) of the said Act.
13. In the original pleadings, the 3rd Defendant was not part of the suit. However, after hearing parties to this application, the court delivered a partial Ruling on 24th September 2014 in which the court ordered that the 3rd Defendant be made party to the suit herein. Earlier on 6th June 2014 the court had given interim orders stopping the completion of the sale of the suit property until this application is heard.

The Plaintiffs/Applicants Submissions

14. The Plaintiff invited the court to find the issue for determination at this stage to be whether the auction conducted by the 2nd Defendant/Respondent on the 3rd June, 2014 was proper and adhered to the [Auctioneers Rules](#) and Regulation of selling property in a public auction. The Plaintiffs submitted that the question to ask is why the 3rd Defendant came to the auction late after the same had been adjourned; Why did he purchase a pre-bidding cheque of Kshs 1 million after the bidding as confirmed by himself at paragraph 6 of his replying affidavit; why as the 3rd highest bidder the hammer was dropped in his favour? The Plaintiffs' submitted that the 3rd Defendant was clearly in constant communication and or collusion with the Auctioneer and therefore the transaction was not done above board and the 3rd defendant were part and parcel of the whole scam. That being the case, it was submitted for the Plaintiff that the transaction was null and void ab-initio and the issue of fraud was so clear throughout the entire transaction.
15. The Plaintiffs also submitted that the 3rd Defendant cannot rely on Sections 23 and 24 of the Registration of Titles Act. Section 23 of the Registration of Titles Act (Repealed) gives special protection by conferring indefeasibility to a person who has lawfully acquired title to property . This provision has been replicated in the Section 26(1) of the [Land Registration Act](#), Act No 3 of 2012. The Plaintiffs submitted that the cited provisions only protect a *bona fide* purchaser for value without notice and who is not privy to the fraud. Since in this case the alleged auction was fraudulent the 2nd defendant having flowed all the requisite requirements under Rule 21 of the [Auctioneers Rules](#), the seller had no title to pass to the 3rd defendant capable of being called an indefeasible title as per the law, and all subsequent transactions including the registration of the memorandum to the 3rd Defendant and the process of the transfer of the property to the 3rd Defendant are all null and void. The issue of indefeasibility of Title does not therefore arise. The Plaintiffs/Applicants relied on the following cases:-
- i. [Wreck Motors Enterprises v The Commissioner of Lands and others](#) Nairobi Civil Appeal No 71 of 1997 (Unreported), [Nairobi Permanent Markets Society and others v Salima Enterprises and others](#) Nairobi Civil Appeal No 185 of 1997 (Unreported),
 - ii. [Joseph N K arap Ng'ok v Justice Moiwo ole Keiuwa and others](#) Nairobi Civil Application No NAI 60 of 1997 (Unreported).
16. The Plaintiffs further submitted that in any case, the respondents have not proved that the transfer was completed in favour of the 3rd Defendant. In such circumstances, the 3rd Defendant cannot claim to have attained any title to the property as no evidence has been adduced indicating that he made even the payment 25% by close of the day on the 3rd June 2014 and or the full purchase price.

The Defendants/Respondents Submissions

17. The 1st and 2nd Defendants raised the following issues in their submissions



- a. Whether the auction was properly and regularly conducted;
- b. Whether the 3rd Defendant legally acquired the property and should be protected in Law; and
- c. Whether the Applicants are entitled to the prayers sought.

18. In answer to issue number one above, the Defendants noted that it is not in doubt that the 1st Defendant's statutory power of sale had arisen. This was exercised pursuant to the instructions issued to the 2nd Defendant. The procedural steps leading up to the auction as provided by the Auctioneers Act and Rules were also carried out as evidenced by the Notification of sale dated 7th March 2014 at pages 63 and 64 of the Replying Affidavit of Ben Mwaura, and the advertisement in the dailies on 19th and 26th May 2014 at pages 81 and 82 of the same Affidavit. The Defendants restated the requirements for a public auction under the *Auctioneers Rules*, 1997 as follows:

Rule 15: the Auctioneer should:

- a. record the instructions in the register;
- b. prepare a notification of sale (Form 4);
- c. locate the property and serve the notification of sale of the property on the registered owner;
- d. give in writing to the registered owner a notice of not less than forty five days within which time the owner may redeem the property by payment of the outstanding debt;
- e. on expiry of the forty five days without payment arrange the sale of the property not earlier than fourteen days after the first newspaper advertisement;

Rule 16: the Advertisement should include:

- a. the date, time and place of the proposed sale,
- b. the conditions of sale,
- c. time of viewing the property to be sold; and
- d. all information required to be contained in the letter of instruction except the amount to be recovered and the exact amount of any reserve price.

19. It was submitted that the 1st and 2nd Respondents in their respective Affidavits have provided evidence showing that all the above requirements were met before the date of the auction. Pursuant to the above rules and in very clear and precise terms, the advertisements of 19th and 26th May 2014 stated that the auction was scheduled to begin at 11.00 am and contained four (4) main conditions to be met by persons interested in the bidding as follows:-

- a. all intending purchasers are required to view the property and verify the details as these are not warranted by the auctioneers;
- b. A deposit of 25% must be paid in cash or bankers cheque at the fall of the hammer and the balance will be paid within 30 days to the charges advocates
- c. a bidding deposit of Kenya shillings one million (Kshs 1,000,000.00) by way of bankers cheque will be mandatory; and



- d. the sale is subject to a reserve price. And land board consent if applicable.

The question that arises therefore is who amongst the bidders present on the date of the auction met all the foregoing pre-conditions. It was submitted that it is only the 3rd Respondent met all the conditions of the sale. The Applicants failed to qualify as the successful bidders for the following reasons:-

- a. The 1st Applicant has stated that contrary to the conditions of sale in the advertisement, he went for the auction with corporate cheques instead of bankers cheques of Kshs 1,000,000.00. He alleges that he was advised by one of the 2nd Defendant's employee, Anne Magondu that the same would suffice. The said allegations are untrue and unsupported as no evidence of such communication and or assurance by the said Anne Magondu has been produced by the Applicants.
- b. The 2nd Respondent avers that there was no such waiver of the conditions of the sale as alleged and this has been confirmed in the Affidavit of Anne Magondu at pages 2 and 3 of Joseph's Affidavit marked as JG2. Further, as pleaded in Joseph's Affidavit, during the auction, the 1st Plaintiff's representative was informed that he was required to have two bankers cheques as per the terms of the advertisement but he failed and or neglected to procure the same.
- c. The Applicants' offers at Kshs 36.1 million and Kshs 30 million respectively failed to meet the intended reserve price as provided in the valuation report dated 21st November 2013 and marked as JG3 in Joseph's Affidavit. The 2nd Defendant's representative informed them that the auction would proceed later after they had consulted their families and or any other persons giving a higher bid.
- d. On the date, at around 1.30 p.m. the Applicants were recalled by the 2nd Defendant owing to the presence of a new bidder, that is by 3rd Defendant, and the auction proceeded. Despite the 1st Plaintiff giving the highest bid at Kshs 38million and the 2nd Plaintiff at Kshs 37.5 million, the hammer was lowered to the 3rd bidder at 37million who had complied with all the conditions of the sale.
- e. The 1st and 2nd Applicants did not produce the two banker's cheque of Kshs 1 million, being the bidding deposit, as required. This fact has been clearly confirmed by the Applicants' own affidavit at paragraph 26 when they were requesting to deposit the funds by RTGS which request was declined as already there was a bidder who had met all the conditions of the sale and had met the reserve price of Kshs 37,000,000.00.

In addition the Defendants cited Rule 17 on the *Auctioneers Rules* provides that;

- a. a public auction shall take place between the hours of 10.00 a.m. and 10.00pm; and in a venue open to and accessible to the public; and
- b. sub-rule 4; The highest bidder shall be the purchaser subject to compliance with the conditions of sale.



20. From the foregoing the Defendants submitted that the auction was conducted fairly and procedurally between the hours of 10.00 a.m. and 10.00 p.m. in accordance with the Auctioneers Rules. Therefore the allegation by the Applicants that the auction should have been re-advertised for the afternoon session is unfounded as the same lacks any legal backing. The whole rationale of advertisement is to inform interested bidders of the auction which fact was well communicated to the Applicants by way of telephone calls and messages and based on that information, the Applicants participated in the afternoon session. Having participated in the afternoon session of the auction it was submitted that the Applicants are estopped from challenging the propriety thereof. In response to the allegations that the Applicants were the highest bidders and thus entitled to be declared the successful bidders, the Defendants submitted that the Applicants failed to meet the conditions of sale specifically; 'A deposit of 25% must be paid in cash or bankers cheque at the fall of the hammer'. The Respondents relied on the case of Jane Wambui Macharia v Giro Commercial Bank Limited & 2 others [2008] eKLR where Justice Kimaru held as follows:

“The Plaintiff further challenged the manner in which the suit properties were sold by the 1st defendant in exercise of its statutory power of sale. It was the plaintiff's case that the 1st defendant had deliberately sold the suit properties at a price that was far below the actual value of the said properties. She took issue with the fact that the 1st defendant had sold the suit properties to persons who were not the highest bidders. I have perused the list of bidders which was annexed to the replying affidavit sworn on behalf of the 1st defendant. It is true that some bidders bid amounts which were higher than the actual amount the successful bidders offered. However, I noted that the persons who quoted higher figures did not pay the requisite deposit of 10% of the bid price as provided in the conditions of sale which was supplied to prospective bidders prior to the said sale by public auction.”

In view of the foregoing, the Respondents submitted that only the 3rd Defendant offered a bid that met the requirements of the auction in that, he duly deposited the bidding deposit in the form of two (2) bankers cheques in the sum of Kshs 1,000,000.00 and 25% deposit in the sum of Kshs 8,250,000.00 by Electronic Funds Transfer on 3rd June, 2014. (The copies of the cheques and EFT/RTGS form are evidenced in Ben's Affidavit at page 86-89 and marked "BM 3 a and b") In the premises, the Respondents urged the court to find that the Applicants have failed in toto to demonstrate that the public auction was flawed in any manner whatsoever.

21. The second issue raised by the Respondents is whether the 3rd Defendant acquired legal title to the property and which should be protected by this court. The suit property is registered under the Registration of Titles Act (now repealed) and thus the applicable procedural law is the Land Act. Section 99 of the Land Act provides protection to purchasers of charged property in exercise of the chargee's statutory power of sale as follows:

“This section applies to—

- (a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser;
- (3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud,



misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

22. The Respondent submitted that in light of the above provisions, the 3rd Respondent is a bonafide purchaser for value in a public auction. There is no evidence that the 3rd Respondent had any notice of any irregularity before or during the auction. All he did was to comply with the conditions of sale and was awarded the bid. Therefore he enjoys protection under the Law. The Court in the case of *Nationwide Finance Co. Ltd v Meck Industries Ltd*, (2005) eKLR, J. Osiero in upholding the provisions of section 68B of the *Indian Transfer of Property Act* (repealed) held as follows:

“The Applicant was an innocent purchaser at a public auction. There is no suggestion that the purchaser had any notice of any irregularity or impropriety in the exercise of the power of sale so as to lose the protection provided by Section 69B of the Transfer of Property aforesaid.”

23. The Respondents submitted that the suit property has already been sold to the 3rd Defendant as evidenced by the fall of the hammer which amounts to a binding contract, the subsequent payment of the 25% deposit on 3rd June 2014 and execution of the sale agreement. As such the property having been lawfully transferred to the 3rd Respondent as a bonafide purchaser for value, the Applicants have no legal remedies over the property.

24. As to the third issue, the Respondents submitted that the Applicants are not entitled to prayers sought since the Applicants pray that the intended sale be set aside. The Applicants have not demonstrated that they complied with the mandatory conditions of the auction and thus they failed on account of their own noncompliance. Upon the fall of the hammer following the acceptance of the 3rd Defendant’s bid, a sale was concluded as between the 1st Defendant and the 3rd Defendant. A chargors equity of redemption immediately lapses upon the fall of the hammer. In *Kiran Ramji Kotedia v Trust Bank Ltd*, HCCC No 1319 of 1999 (UR) Mulwa J found that:

“non-compliance with the provisions of Rule 15 of the *Auctioneers Rules* would not invalidate a sale and would not by itself entitle the Applicant to an injunction.”

In *Captain Patrick Kanyagia v Damaris Wangechi & others*, Civil Appeal No 150 of 1993, the Court of Appeal held that:

“When does the title pass; putting it another way: when does the right of redemption vested in the mortgagor come to an end?... It is clear therefore that Muchemi’s equity of redemption came to an end when the Kanyagias signed the contract of the sale and not later. However, it is not in dispute that even registration of the title of the Suit Property in favour of the Kanyagia’s has also been effected”.

25. Based on the foregoing, the Respondents submitted that upon the fall of the hammer, a valid contract was concluded as between the 1st Defendant and the 3rd Defendant which can only be rescinded and or set aside upon proof of fraud. The Applicants have not specifically pleaded, proved and or demonstrated any fraud committed during the auction and as such the orders of injunction cannot issue. If the Applicants were able to prove any irregularities in the manner the auction was conducted, which they had failed to do, they would be entitled to an award of damages against the auctioneers, the 2nd Defendant pursuant to section 26 of the *Auctioneers Act*. In this case no irregularities have been proven.



26. The 3rd Defendant, in addition to the above submissions, also submitted that the application is incurably defective. This is on the fact that the application and suit were filed by M/s Wambo & Company Advocates whose sole proprietor according to the information provided by the Law Society of Kenya is Otieno Eric Wambo. Further, a search on the Judiciary Website indicates that one Eric Wambo is a Resident Magistrate at the Githunguri Law Courts. It was further submitted that the said Eric Wambo did not hold a practising Certificate for the year 2014, the year when the suit was filed. (Copies of the letter received from the Law Society of Kenya and excerpt from the Judiciary Website are annexed and marked “MM1” in the 3rd Respondent Supplementary Affidavit). On this ground, it was submitted that the suit and the application are unmaintainable and should be struck out with costs.

Section 9 of the *Advocates Act*, Cap 16 is to the effect that;

“Subject to this Act, no person shall be qualified to act as an advocate unless–

- (a) he has been admitted as an advocate;
- (b) his name is for the time being on the Roll; and
- (c) he has in force a practising certificate;

and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4)”.

The law is then very clear that a person is unqualified unless he fulfills the three outlined conditions and the consequences of that are that an unqualified person cannot institute legal proceedings on behalf of another.

Further Section 34 (1) (f) of the same Act provides that;

“(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

- (f) relating to any other legal proceedings;

nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:....

(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

(3) Any person who contravenes subsection (1) shall be guilty of an offence”.

27. In the case of *National Bank of Kenya Ltd v Wilson Ndolo Ayah* [2009] eKLR the Court of Appeal held that;

“Section 34, above, as worded seems to be concerned with offering legal services at a fee when one is not qualified as an advocate. If that be so, what is the rationale for the invalidation of acts done by such an advocate? It is public policy that citizens obey the law of the land. Likewise is good policy that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid. . . . The invalidating rule is meant for public good, more so in a country as ours, which has a predominantly illiterate or semi illiterate population. There is a need



to discourage the commission of such acts. Allowing such acts to stand is in effect a perpetuation of the illegality. True, the interests of the innocent party should not be swept under the carpet in appropriate cases. However it should not be lost sight of the fact that the innocent party has remedies against the guilty party to which he may have recourse. For that reason it should not be argued that invalidating acts done by unqualified advocates will leave them without any assistance of the law. Besides, the Law Society of this country publishes annually, a list of advocates who hold a practicing certificate, for general information. This is a fact we take judicial notice of as courts are also provided with such a list for purposes of denying audience to advocates who do not appear on the list. For that reason the public is deemed to have notice of advocates who are unqualified to offer legal services at a fee. It is also noteworthy that the Advocates Act itself makes provision for the recovery of the fees paid to such an advocate. So the innocent party is reasonably covered, although in our view provisions similar to section 19 of the *Stamp Duty Act*, should have been included in the Advocates Act to remove any doubt as to the validity of documents drawn by unqualified advocates”.

Similarly in *Republic v C.W. Nyamisa exparte Peter Muriithi Kimubu* [2007] eKLR the court was of the view that;

“ . . . An advocate of the High Court of Kenya who is appointed a Judge of the High Court or an advocate who is appointed to the bench as a magistrate must wind up their practice where they are the sole proprietor. That no pleadings is permitted to be filed not more undertaken as an advocate nor work normally done as an advocate should be done whilst on the bench. This applies to lawyers practicing in the said firm as employees I hereby allow the application to struck out the Judicial Review which accordingly do. The Judicial Review stands struck out with costs to the Respondents.”

In a more recent case *Lucia Mwehya T/A Kalebran Enterprises v Nairobi Bottlers Limited & 3 others* [2012] eKLR the Court held that;

“It is therefore my considered view and I so hold, not without some sympathy to the plaintiff, that save in cases where Section 24 aforesaid applies, a pleading signed and filed by an advocate before issuance of a practicing certificate is incompetent and is liable to be struck out.”

Analysis

28. I have carefully considered the application and the opposing submissions. The issues which in my view arise, for determination are as follows:-
 - i. Whether or not the said auction was lawfully staged, and if so whether the 3rd Party acquired the title to the suit property.
 - ii. Whether the application is incurably defective as alleged by the 3rd Defendant.
29. From the outset this court must make it abundantly clear that the process leading to the said auction of the suit property had been tedious, and the Plaintiff had made it extremely difficult for the 1st Defendant to realise the security it was offered to secure the funds disbursed. It must therefore have come as a great relief the leave the court granted to the 1st Defendant to serve afresh the statutory notice and sell the property by public auction. The pleadings and previous orders in this matter show that the Plaintiffs have no valid claims against the 1st Defendant, and that it is the Plaintiff's contractual



duty to either repay the entire outstanding sums now due to the 1st Defendant, failure whereof, as has happened the 1st Defendant is entitled to sell the security. So in this application we are not concerned with the 1st Defendant's rights to realise its security. Rather, the process adopted by the Auctioneer is what is being questioned and the duty of this court is to establish whether the same was done in accordance with the law. The Applicants' herein now challenged the outcome of the said public auction on the basis that it was neither lawful nor procedural. It is the Applicant's contention that the suit property was advertised for sale by public auction in the Daily Nation on 20th May 2014 by the 2nd Defendant, and the auction was slated to take place on 3rd June 2014 at 11.00 a.m. at the Auctioneers' Offices of Mahu House, Kenyatta Market. The auction was attended by the Plaintiff's representative and the 1st Defendant's representative Felix Muhati among others. The Applicants' alleged that when their representatives reached the Auction place at Muhu House, Kenyatta Market at about 11:30 a.m. they found the Second Respondent representative and two other bidders one who he came to know as Jane Nduta Chege the 2nd Applicant herein. The moment the auction started one person bid a sum of Kshs 5 Million and the bidding continued and by 12:30 p.m. the Applicant who was the highest bidder had given an offer of Kshs 36.1 Million and the Second bidder had an offer of Kshs 30 Million. The Auctioneer then called off the auction reason being that the bids could not meet the threshold of the reserved price and informed them that he had to re advertise the auction again, and he further advised them to leave their mobile phone numbers. After this all the bidders dispersed awaiting further advertisement. Later at around 2;30 pm the second respondents representative one Joseph Gikonyo called Jese Wanyeki Mwangi on his cellphone number 0720431776 and asked him to go back to the Auction venue as they have slotted again for the auction to proceed at 3;30 p.m. The Applicants' representatives then returned to the auction hall upon being sent an SMS message by the Auctioneer to return. Soon thereafter another gentleman who Jesse latter came to know as Martin Matu appeared and entered straight to the Second respondents Managing Directors office adjacent to the auction room. He emerged from the said room accompanied by Joseph Gikonyo the Auctioneer and the auctioneer informed them that Martin Matu is the one who had given a new and better bid. The 1st Applicant's representative tried to protest but the Auctioneer insisted on proceeding. The auction then proceeded in much the same way as described by the Auctioneer. The 1st Plaintiff believes that the Auction that was scheduled for the 3rd June, 2014 was called off at 12;30 p.m. the moment the bidders could not arrive at the reserved price and the moment the Auctioneer told them that he could advertise the property once again. He further believes that the entire Auction process was null and void ab initio since none of the bidders was vetted prior to the start of the Auction on the pre bidding conditions as advertised in the Daily Nation of 26th May, 2014.

30. The issue now is whether or not the process described above was lawful or unlawful. The relevant rules directing the conduct of the auctioneer from receipt of instructions to the carrying out of the same are found at Rules 15 to 18 of the [Auctioneers Rules](#) 1997. It is clear that the auctioneer had fully complied with Rule 15. Rule 16 states:-

“ 16

- (1) An advertisement by an auctioneer shall, in addition to other matters required by the court, contain:-
 - a. The date, time and place of the proposed sale.
 - b. The conditions of sale or where they may be obtained.
 - c. ...



- d. ...
- e. ...
- f.

31. In as far as this application is concerned, the facts of what transpired are not disputed. Neither is it disputed that the Plaintiffs did not meet conditions requiring them to deposit Kshs 1,000,000/= and the 25% of the purchase price. These issues are not disputed. They are not disputed because the Kshs 1,000,000/= deposit required was to be in a form of bank cheque. The alleged promises given to the Plaintiff that personal or corporate cheques would be accepted cannot be accepted in this court as long as the auctioneer denies the same. Again as per the replying affidavit of Anne Wanjiru Mogondu, the Plaintiff was aware of the auction as from 30th May 2014, yet the auction took place on 3rd June 2014, giving the Plaintiff ample time to buy a banker's cheque. In this regard, I find that the Plaintiffs had not complied with the conditions of sale under Rule 16 (1) (b). However, this finding comes secondary to the finding of whether or not a lawful auction took place on the 3rd June 2014. This issue takes me to Rule 16 (1) (a) on the date, time and place of auction. The auction was advertised to take place at 11.00 a.m. This happened with only two bidders upto sometime past 12.00 noon, when the Auctioneer declared the auction unresponsive as he was not able to get competitive bids in accordance with the reserve price. The auctioneer then adjourned the session, with a rider that the same could continue later in the event other bidders showed up. This action by the auctioneer raises serious issues as follows:- Can an auction in the same transaction, be conducted in stages during the cause of the day. If yes, what does that do to the integrity of the process. If yes again, does it open the process to speculation and connivance with bidders who may not be physically present at the auction. If yes, is such an action lawful?
32. Under Rule 17 (1) (b) an auction of immovable property may take place between 10.00 a.m. and 10.00 p.m. This means that an auction of immovable property advertised to take place at 11.00 a.m. may proceed upto 10.00 p.m. That, in my view, however, necessarily implies that the auction process must be one uninterrupted transaction. The moment the chain of causation is interrupted, rather than in the normal course of the proceedings for example to break for tea, if that were possible in a single transaction, the entire process must commence afresh. An auction process cannot purport to wait for bidders, or to pick bidders enroute. The process once started must retain its integrity. The conduct thereof must not leave room for speculation. The auctioneer cannot conduct an auction in a manner to leave the impression that he expects hitherto none present bidders to offer better bids. Once the 2nd Defendant Auctioneer herein ascertained, as he did soon after 12.00 noon, that the bids were not competitive and called it off, he had no right to start it again without giving the public knowledge of the future date. The morning session was not responsive, and was closed for that reason. The afternoon session, to gather validity, ought to have been advertised. One may argue that the Plaintiffs' representatives, by agreeing to attend, and to participate in the afternoon session, had ratified and validated the afternoon process. That may appear to be correct, but only as between the present bidders, and not the public. There is a reason why the auction is called Public Auction and not private auction. A public auction is a process open to the public. The public only come to learn about it when it is advertised. The moment the advertised day and time comes, and the auction is not responsive and it is stoooped for that reason, a valid similar process can only start with a fresh advertisement. In this instance, the public was not aware of the afternoon session. Whatever transpired in the afternoon was a private arrangement shared into by the parties before the court, and for all intents and purposes, was not a public auction. So, in my view, no public auction took place on 3rd June 2014 involving the suit property.



33. Secondly, to hold that the Plaintiff ratified and validated the process by attending the afternoon session would amount to giving the auctioneer freedom to change the auction rules with impunity whenever he wills, and especially whenever he thinks that he could wait for a none present bidder to give a higher bid. In that case there would be no need to stage a public auction. The auctioneer may as well develop and carry out his own rules as he pleased.
34. So to answer the questions I posed herein above, I do not think, especially for the case at hand, that an auction can be held in stages during the cause of a day, where in one or more stages, the auctioneer awaits for hitherto unknown bidders, or picking bidders enroute like a moving bus or matatu picking passengers. If that is allowed to happen the entire integrity of the public auction process would be compromised, and with it the rule of law. This will open doors to speculation with the possibility of the auctioneer colluding with hitherto unknown bidders to defeat the bids put on the floor of the auction house. Such a process, if allowed, would be unlawful. That is exactly what took place in the matter at hand. Since there was no auction as deemed by the law, whatever transpired on 3rd June 2014 purported to be a public auction, was not a public auction, was an unlawful process which was incapable of conferring any title or proprietary rights to the alleged successful bidder - the 3rd Defendant. I therefore reject the submission that the Third Defendant had acquired title which needs to be protected by law. A title can only be acquired through a lawful process which this was not.
35. It was also submitted by the Defendants/Respondents that under Section 26 of the [Auctioneers Act](#), any aggrieved party in an auction can only recover damages against the auctioneer for the auctioneer's wrongful acts during the public auction. I agree with that provision of the law. It first of all envisages an auction which has been properly staged, and which can answer to what is called "Public Auction". However, in this matter, I have found out that there was no auction leave alone "Public Auction". The auctioneer should be ashamed with what transpired under his watch. There having been no public auction Section 26 is not applicable in this matter. In any event, there is evidence of communication between the Auctioneer and the 3rd Defendant. The issues which arise include the nature of that communication and what information concerning the auction exercise, and earlier offers the Auctioneer may have passed to the 3rd Defendant. There are possible issues of fraud, including the possibility that the 3rd Defendant may be guilty of fraud and thus may not be protected both under Section 99 of the [Land Act](#) or under Section 26 of the [Auctioneers Act](#).
36. The third issue concerned the submission that the application is incurably defective on the strength that Otieno Erick Wambo, an advocate alleged to be in the firm of the Applicant's advocates, did not have a practising certificate for the year 2014. However, no evidence has been brought to this court to show that the said Otieno Eric Wambo drafted and signed these proceedings. On the contrary, it is shown that the firm of Wambo & Company Advocates is a partnership with associates, who have the capacity to bring these proceedings. This is a matter which is raised only by the Third Defendant, and is almost as an afterthought brought to fight off this application. Without going into any further deliberations of this allegation, I will only emphasize that it is the kind of allegation which is technical, and which this court under Article 159 (2) (d) shall not resort to in order to deny the application the chance to be determined on its merits.

Disposition

27. As I finish I want to re-emphasise the fact that the 1st Defendant's right to realise security cannot be fettered or frustrated any longer. The current proceedings were brought about by the unlawful conduct of the Auctioneer, the 2nd Defendant herein. If the auctioneer just did the right thing the 1st Defendant would have by now realised its security. With that observation in mind, I make the following orders:-



- (a) The Public Auction staged for the sale of the suit property on 3rd June 2014 and all the consequences arising therefrom are hereby set aside.
- (b) The 1st and 2nd Defendant's are at liberty to advertise afresh the sale by Public Auction of the suit property, immediately, without giving a fresh statutory notice.
- (c) The 3rd Defendant shall be refunded all the monies paid by him to the 1st or 2nd Defendant pursuant to the aforesaid alleged public auction stated on 3rd June 2014.
- (d) The costs of this application are for the Plaintiffs and the 1st Defendant and shall be paid by the 2nd Defendant.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 13TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

Present:

Mr. Omari for the Plaintiffs

M/s Gitonga for the 1st and 2nd Defendant

Mr. Kabaiko for the 3rd Defendant

Teresia – Court Clerk

